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NOTES ON CURRENT AND RECENT EVENTS.

ANTHROPOLOGY—PSYCHOLOGY—LEGAL-MEDICINE.

Expert Testimony.—The following is the report of the Committee on Expert Testimony of the American Medical Association. It was presented in Chicago on Feb. 23, 1914, before the Tenth Annual Conference on Medical Legislation held under the auspices of the Council on Health and Public Instruction of the American Medical Association. The report as we have it here is taken from the *American Medical Association Bulletin* of March 15, 1914, pp. 166-169.—[EDS.]

Dr. Moyer, the chairman of this committee, in his report last year presented a general diagnosis of the present situation of medical expert testimony and outlined the plan along which the committee would work.

The chief desire of this committee is to submit not only a logically correct proposal but one that is workable in a practical way and that will stand the test of constitutionality. This last requirement is often not considered in the framing of proposals which involve the changing of legal procedure. One distinguished member of the medical profession expressed his attitude in the following way: "Why should we allow the constitution to stand in the way of intelligent reform?" Whatever may be one's opinion regarding the desirability of having rigid constitutions, they are at present the basis of our institutions, and experience has shown how difficult it is to secure amendments, particularly of those provisions which apply to certain phases of the present problem. As this committee desires to secure legislation that may be available for the present generation, it is endeavoring to work out a plan that will be upheld under a fair interpretation of the existing constitutions. In view of this fact it was thought desirable that I should present to you a brief discussion of the legal and constitutional problems involved in the various proposals that have recently been made relative to medical expert testimony.

Expert testimony is of two general kinds, viz., testimony as to facts and opinion testimony, and the admissibility of each rests upon different theories. The first kind of expert testimony is admissible because special skill and experience are necessary for the understanding of certain matters. Any person of ordinary intelligence can testify whether a man had a cut in his head, or whether there were yellow or brown stains on linen. But it requires special experience and knowledge to state what arteries, nerves, bones, etc., were injured by the cut, and to determine whether the yellow stains on the linen were due to urine or semen, and whether the brown stains were human blood. It is because the ordinary witness is incapable of understanding the particular matter that the expert is required, and for this reason it is necessary that his special knowledge be shown before he is permitted to testify.

As a general rule of evidence opinion testimony is inadmissible. The reason for this is that the facts being before the jury, it is for them to form a judgment and conclusion upon such facts. The rule against opinion testimony is a product of the jury system. Since in many instances it is impossible for the jury to form a judgment because of the difficulty of the question involved, the opinion of those skilled in that particular

EXPERT TESTIMONY

subject may be obtained for the assistance of the jury. For instance, the jury would be incapable of determining whether the cut in the head mentioned above would be likely to cause death, even though it had before it a description of the wound, hence the opinion of a medical man is of assistance to the jury. In the same way the jury would need the opinion of one skilled in real estate values in order to determine what a certain piece of property in the loop district of Chicago is worth. Thus the function of opinion testimony is the advising of the jury, rather than the proving of the case of one of the parties.

Though the reason for the admissibility of expert testimony, whether as to facts or opinion, is the same whatever the subject-matter involved is yet special problems arise in certain kinds of such testimony and the general question may be affected by the legal character of the proceeding. For instance, the problem of expert testimony, particularly of a medical character, is different in criminal cases from what it is in civil. This is due to certain constitutional privileges of the accused, chiefly the following: That his life or liberty shall not be taken without due process of law; that he is entitled to a trial by jury and cannot be compelled to incriminate himself. Under the last of these privileges the position of the expert witness for the state in a criminal prosecution is much more restricted where the question involved is as to the defendant's mental condition than it is where he is asked to testify as to the physical condition of the accused. Although the tendency of the decision is towards compelling the accused to submit to a physical examination by the medical witness for the prosecution, yet the accused cannot be compelled to submit to a mental examination or to answer any questions asked by the witness because this would violate the provision against self-incrimination. As a result of this, the physical examination without any mental examination is of little value in most cases where the mental condition is in question.

During the past few years many proposals for the regulation of expert testimony have been advanced by organizations representing the different learned professions involved. It is now proposed to discuss these different proposals from the legal point of view.

1. That the court be given power to appoint a disinterested witness. This proposal has appeared in two forms, (1) that such witnesses should be the only expert witnesses allowed to testify, and (2) that the appointment of these witnesses by the court shall not affect the right of both parties to call expert witnesses. The first form of the proposal would seem to be clearly unconstitutional as restricting the parties in the proof of their case. The recent decision of the Supreme Court of Michigan holding unconstitutional, as violating the provision against due process of law, a statute which provided that "in criminal cases for homicide where the issues involve expert knowledge or opinion, the court shall appoint one or more suitable disinterested parties, not exceeding three, to investigate such issues and testify at the trial, this provision not to preclude either prosecution or defense from using other expert witnesses at the trial," has seemed to offer a serious obstacle to the adoption of this proposal. The adherents of this proposal need not be discouraged, however, as certain objections which the Michigan court found in their statute can be remedied without affecting the general plan and the courts of most of the other states are likely to be more liberal

EXPERT TESTIMONY

in their interpretation of the constitution than was the Michigan court. If this proposal should be considered advisable, it is reasonably certain that the constitutional difficulties may be solved.

2. That a fixed group of experts shall be appointed or otherwise determined from which all expert witnesses must be chosen. Though this might be feasible in certain lines of professional activity, it would be impracticable in others. There is a greater diversity of opinion regarding the advisability of this proposal. One of the legal difficulties is that the law in prescribing the qualification for experts, has not required any professional connection with the subject, the test being, does the witnesses have the special knowledge and experience required? A statute providing for the selection of such a group would probably be held constitutional.

3. That expert witnesses be permitted to make a physical and mental examination of the person regarding whom they are to testify. The difficulty of this proposal, where the question involved is the mental condition of a defendant in a criminal case, has already been discussed. In all other cases it would seem practicable.

4. That the expert witness shall submit his testimony in the form of a written report. This plan is possible only where the testimony of the witness is as to facts and opinion based upon such facts. Where his testimony is purely opinion based upon facts testified to by others, there is no opportunity for the preparation of such a report.

5. That the expert witnesses shall consult and agree upon a joint report, the so-called "Leeds" method. There is no legal objection to this plan. A too-partisan lawyer might object to having his witness consult with the witness for the other side, and the witnesses themselves might have difficulty in agreeing. These considerations are, however, of a purely practical character. Where experts are appointed by the court a consultation and agreement by such experts would be highly desirable if not essential.

6. That the number of expert witnesses which each side may call shall be limited. This is possible where the witnesses are to give purely opinion evidence, but not where they testify as to facts. This difference is due to the distinctive character of these two kinds of testimony as set forth in the beginning of this report.

7. That commissions of experts be appointed for the determination of technical matters and that such matters shall not be submitted to the jury. For instance, it has been strongly advocated that in criminal cases where insanity is set up as a defense the jury should find only whether the defendant did the wrongful act and that a commission of alienists shall determine the responsibility of the defendant. In this proposal the true function of the medical expert is lost sight of. Criminal responsibility is a legal question which should be answered by the jury under proper instructions from the court. The function of the expert is to testify as to the mental condition of the accused. A constitutional question is raised every time it is proposed to restrict the functions of the jury in criminal cases.

The committee realizes that the success of any plan regulating the introduction of expert testimony depends upon the skill and co-operation of judge, witness and lawyer. It is impossible to frame any proposal that will accomplish good results without these. The present tendency in the legal profession is towards a less antagonistic attitude in the trial of a case, i. e., the adminis-

PUBLIC DEFENDER OF LOS ANGELES

tration of justice is not being regarded quite so much as a sporting proposition. Likewise the courts are becoming more liberal in upholding the constitutionality of reformative measures. Thus there is hope for the adoption and successful operation of a truly meritorious proposal. This committee hopes to be able to submit such a proposal in the form of a bill at the next meeting of this conference.

HAROLD N. MOYER, Chairman of the Committee, Chicago.

PROF. E. R. KEEDY, Northwestern University Law School, Chicago.

Meeting of the Society of Anthropology, Sociology and Criminal Law—

The first convention of the society was held in Rome at the University, April 17-19, 1914. The following subjects were discussed: (1) The segregation of habitual offenders under indeterminate sentence, the protection of them and their families during the period of detention, and the proper conditions and procedure for their release. (2) The application of the science of criminal anthropology in the work of prevention by the police. (3) The personality of the convicted person under the new code of penal procedure. (4) The duty of society to recompense the person injured by a crime, and his right, under the new code of penal procedure, to be a party in the criminal prosecution and to have his damages ascertained. Among those participating in the discussions were Professor Enrico Ferri of the Scuola d'Applicazione geuridico criminale, of the University of Rome; Raffaele Garofalo, President of the Court of Canahun of Rome; Augusto Tambarini, Professor of Psychiatry, University of Rome; Mario Carrara, Professor of Legal Medicine and Criminal Anthropology, University of Turin; Agyato Berenini, Professor of Criminal Law and Procedure, University of Parma; Leonardo Bianchi, Professor of Psychiatry, University of Naples.

E. A. GILMORE, State University, Madison, Wis.

COURTS—LAWS.

The Public Defender of Los Angeles County, Cal.—Following is a copy of a letter from the Public Defender of Los Angeles, Cal., addressed to A. C. Umbreit, Esq., of Milwaukee. The opening paragraph explains the occasion of the letter. The copy of the provisions of the charter of the county of Los Angeles referred to in that paragraph is found at the conclusion of the letter.—[Eds.]

Los Angeles, Cal., March 17, 1914.

A. C. Umbreit, Esq.,

Chairman Committee on Public Defender,

Railway Exchange Building, Milwaukee, Wis.

Dear Sir:

"In response to the request of the special committee of the Milwaukee Bar Association appointed to investigate the matter of the appointment of a public defender for Milwaukee, I am enclosing a copy of the provisions of the charter of the county of Los Angeles prescribing the duties of the public defender.

"While the legislature of the state has authority to create the office of public defender for all counties no action has been taken by the legislature up to the present time except to ratify the charter of Los Angeles county